AMANAH MERCHANT BANK BHD.

v.

SUMIKIN BUSSAN KAISHA LTD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-22-655-89]
2 OCTOBER 1992

CIVIL PROCEDURE: *Appeal - Summary judgment - Order 14 of Rules of the High Court 1980 - Refusal by Senior Assistant Registrar to grant plaintiffs an O. 14 judgment - Defendants had guaranteed the loan to borrower company - Borrower defaulted repayment - Receiver/manager appointed who then sold the assets of borrower - Shortfall - Plaintiffs thereupon sued defendants to recover the shortfall - Defendants alleged that shortfall was due to negligence of receiver/manager - Whether receiver/manager was the agent of the plaintiff.*

This was an appeal by the plaintiffs against the refusal by the Senior Assistant Registrar to give it an O. 14.

A consortium of lenders, including the plaintiffs (who acted as agent for the lenders) had granted credit facilities to a borrower company, which facilities were secured *inter alia* by a debenture over the assets of the company and the defendants' Guarantee, the defendants' liability being limited to 14% of the maximum recoverable amount. Upon the borrower's default in repayment, a receiver/manager was appointed, who after managing it briefly, then sold off the assets of the borrower and remitted the proceeds thereof to the plaintiffs. The plaintiffs then sued the defendants, as guarantor, for their share of the shortfall.

The defendants, contending that the shortfall was caused by the negligence of the receiver/manager as the agent of the consortium, argued:

(i) that as the receiver/manager had failed to obtain a proper valuation of the assets and had not properly nor adequately advertised the proposed sale, the assets therefore were sold at an undervalue.

(ii) that the receiver/manager unduly delayed crediting the plaintiffs with the proceeds of the sale for which period the Borrower had the default interest charged against it.

(iii) that the repayment of the loan of RM1.5 million to the Oriental Bank which was borrowed by the receiver/manager during its management of the company was questionable as it was repaid in priority to the amounts owing under the debenture.

The plaintiffs case was that:

(a) the defendants had by the terms of the guarantee, contracted away their right to raise the complaint that the securities were released far less than their worth;

(b) the receiver/manager was the agent of the borrower and not of the plaintiffs and thus any negligence on his part could not be attributed to the plaintiff;

(c) in any event, there was no negligence on the part of the receiver/manager.

Held:

[1] The defendants were by the terms of their guarantee document, contractually estopped from complaining that the securities were released far less than their worth. In any event, by the terms of the debenture, the receiver/manager was agent of the borrower and not of the plaintiffs.

[2] There was no evidence of negligence either in the valuation or in advertising the sale of the said property.

[3] The RM1.5 million loan from the Oriental Bank was authorised by the terms of the debenture and the defendants had failed to prove that the loan which was borrowed to run the borrower company, had been taken improperly.

[4] The fact that the monies realised from the sale of assets were not immediately credited to the account of the borrower was not a triable issue as the agreement for the sale of the assets did provide that the monies would be held by the solicitors until certain matters had been attended to. In any event, the monies had been held in fixed deposits and when the money was released, it was released together with the earned interest.

[5] For the reasons stated above, the plaintiffs were entitled to summary judgment under O. 14 of the Rules of the High Court 1980.

[Appeal allowed with costs here and of the Court below.]

Cases referred to:
Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267 ***(foll)***
Perry v. National Provincial Bank of England [1910] 1 Ch 464 ***(refd)***
O'Day v. Commercial Bank of Australia Ltd. [1933] 50 CLR 200 ***(foll)***
Roynat Ltd. v. Denis et. al. 139 DLR (3d) 265 ***(refd)***
Cow v. Casey [1949] 1 KB 481 ***(refd)***
Lathom v. Greenwich Ferry Co. [1895] WN 66 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 94
Rules of the High Court 1980, O. 14

Other source referred to:
Receivers and Administrators, Kerr, 17th Edn., p. 225

For the appellant/plaintiff - Yoong Sin Min (Karen Kaur with her); M/s. Shook Lin & Bok
For the respondent/defendant - Aggie Chew; M/s. Cheang & Ariff

JUDGMENT

VC George J:

This is an appeal by the plaintiff against the refusal by the Senior Assistant Registrar to give it an O. 14 judgment.

A consortium of financial institutions including the plaintiff and with the plaintiff acting as the agent of the consortium, had provided certain credit facilities to Malaysian Prestressed Concrete Strand Manufacturing Sdn. Bhd. (the borrower). The Security provided for the facilities were a debenture creating a fixed charge over certain lands and a floating charge over *inter alia* the undertakings of the borrower, an assignment of the agreement evidencing ownership of those lands and a charge (under the National Land Code) held in escrow over the said lands. There was also a joint and several guarantee (in respect of repayment of the monies provided under the facilities) by one Malayan Ropes Bhd. and the defendant, the defendant's liability being limited to 14% of the maximum recoverable amount.

The borrower defaulted in the repayment. The plaintiff on behalf of the consortium had the debenture crystalised and appointed a receiver and manager who apparently managed the business of the borrower for a while and thereafter sold off the assets of the borrower under

his control and eventually remitted the proceeds of the sale to the plaintiff. There was a shortfall and upon the defendant not meeting a demand made on it for its 14% share of the shortfall the instant action was filed.

For the defendant it was contended that there was the alleged shortfall only because of the negligence of the receiver and manager as the agent of the consortium in the discharge of his duties as receiver and manager. It was contended on behalf of the defendant that had there been a proper discharge by the receiver and manager of his duties there would not have been a shortfall - at worst the amount of the shortfall would have been significantly less than what it was and until the quantum of what could have been obtained was ascertained the plaintiffs were not entitled to summary judgment.

The negligence alleged against the receiver and manager, shortly stated, is that he had not obtained a proper valuation of the assets, had not properly or adequately advertised the proposed sale and had sold the assets at an amount that was significantly less than had the sale been effected properly.

The defendants also complain that not only was the receiver and manager negligent but he had also held back crediting the borrower with the proceeds of the sale of the assets for an unreasonable length of time during and for which period the borrower had default interest charged against it. Accordingly, it was submitted that if the plaintiff was entitled to judgment it would in any event be for a lesser amount than prayed for.

In the course of the receiver and manager managing the undertakings of the borrower it had borrowed some RM1.5 million from the Oriental Bank Bhd. which was, with the consent of the consortium, repaid in priority to the amounts owing under the debenture. The defendants say that their doing so was questionable and provides another triable issue.

For the plaintiffs, it was contended that the guarantor defendant was by the terms of the guarantee estopped from raising any of the complaints that they raised. The submission was that the guarantor had contracted away its right to raise the complaints it raised. It is settled law that a guarantor can contract away rights which he would otherwise have. It depends on the terms of the guarantee. In *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267 at 274 the Federal Court pointed out that:

> A contract of guarantee, like all other contracts, depends primarily upon its expressed terms and the respective rights on the parties must be gathered from the guarantee form used in a particular case. It should be strongly emphasised that the effect of a guarantee depends very much on the form of words used in the contract.

And in *Perry v. National Provincial Bank of England* [1910] 1 Ch. 464 at 471, Cozens-Hardy MR said:

> This is a curious case arising out of the law of principal and surety. It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. It is elementary law that in a simple case of principal and surety the surety is discharged if the creditor gives time to the principal or does certain other acts; and, *a fortiori*, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release, the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is giving time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is

not then a simple contract of suretyship. It is true that in one sense it is a contract of suretyship, but it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had.

Even the right of subrogation can be contracted away. In *O'Day v. Commercial Bank of Australia Ltd.* [1933] 50 CLR 200, a decision of the High Court of Australia, Dixon J said commencing at the bottom of p. 219:

> The ordinary rights of a surety in respect of securities given by the principal debtor do not exist in the present case. Each of the instruments of suretyship contains elaborate provisions which effectually disentitle the surety to any interest in, and to any rights in respect of the Security whether by way of subrogation or otherwise. It follows that no reliance could be placed upon a contention that the acts of the bank amounted to a wrongful dealing with securities discharging the surety.

The principle was accepted in Canada as can be seen in *Roynat Ltd. v. Denis et. al.* 139 DLR (3d) 265, where at p. 279 the Judge found assistance from an earlier judgment of the Supreme Court of Canada referred to at pp. 426-7 DLR:

> Despite this rule, it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule requiring preservation of his Security. If authority is needed for such a proposition, it may be found in *Rose v. Aftenberger et. al.* [1969] 9 DLR (3d) 42 at p. 47 [1970] 1 OR 547 CA at p. 552, where Laskin JA, as he then was, speaking for the Ontario Court of Appeal, said:
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> > The law is that sureties are entitled to the benefits of any Security taken by a creditor who has their promise to pay the debt of the principal obligor, unless the sureties have contracted themselves out of this right or are estopped from asserting it. In this connection, it is immaterial when the Security was taken or whether the guarantor knew of it at the time.

In the instant case, purportedly in the context, Counsel for the plaintiffs referred to *inter alia* ss. 4.01, 5.01 and 6.01 of the guarantee which for ease of reference is reproduced here:

> *Section 4.01*
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> The obligations of the Guanrators shall not be discharged except by performance and then only to the extent of such performance. Such obligations shall not be subject to any prior notice to or demand to the Guanrators with regard to any default of the borrower and shall not be impaired by any extension of time forbearance or concession given to the borrower or any assertion of or failure to assert any right or remedy against the borrower or in respect of any Security created by or in pursuance of the Security documents and or any modification or amplification of the provisions thereof contemplated by the terms thereof or any failure of the borrower to comply with any requirements of any law regulation or order in Malaysia or of any political subdivision or agency thereof.
>
> *Section 5.01*
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> The agent and the Participants shall be at liberty without thereby affecting their rights against the Guanrators under this guarantee to grant to the Borrower any time or indulgence for the payment of moneys due to the agent and or the Participants or for the observance of any term stipulation covenant or undertaking on the part of the Borrower to be observed and performed under the terms of the Security documents and of this guarantee or to vary or substitute the securities held by the agent and or the Participants or any of them or to release any such securities or part thereof.

Section 6.01

> This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other Security now or hereafter held by the agent and or the Participants or any of them for all or any part of the moneys hereby guaranteed nor shall such collateral or other Security or lien to which the agent and or the Participants or any of them may be otherwise entitled or the liability of any person or persons or corporation not parties hereto for all or any part of the moneys hereby secured be in any way prejudiced or affected by this present guarantee. The Guanrators shall make no claim to such collateral or other Security or any part thereof or any interest therein unless and until the agent and or the Participants shall have received the full amount hereby guaranteed hereunder.

In my judgment the guanrators agreeing in s. 4.01 of the guarantee document that their obligations "shall not be impaired ... by any assertion of or failure to assert against the borrower or in respect of any security ..." read together with agreed indulgence set out in s. 5.01 that the consortium "shall be at liberty without thereby affecting their rights against the guanrators ... to vary or substitute the securities held ... or to release any such securities or part thereof" has the effect of preventing the guanrators from effectively complaining that the securities were released for less than their worth which in effect is what the defendant is complaining about. No doubt the last sentence in s. 6.01 of the guarantee has the effect of preserving the Contracts Act 1950 s. 94 right of subrogation by the Guanrators in respect of the securities provided that the consortium shall have received the full amount guaranteed. However this sentence has in the context to be read with the implied proviso which could be worded as "provided that the securities had not been previously released pursuant to s. 5.01". If the consortium is entitled without impairing its rights against the Guanrators to release any of the securities without any consideration for so doing, which is what is expressly provided for by s. 5.01, it is equally entitled to release the securities in consideration of the receipt of RM14,400,000 as had happened and the Guanrators are contractually estopped from seeking to know why only that amount was realised.

In any event the alleged negligence of the receiver and manager that has resulted in the alleged impairment of the guarantors' right of subrogation, in the context, turns on the receiver and manager being in fact the Agent of the consortium (or of the plaintiff as "Agent" of the consortium).

On behalf of the plaintiff it was contended that there was no need for a trial to conclude that on a true construction of the debenture the receiver and manager, although appointed by the plaintiff, was at all relevant times in fact the Agent of the Borrower and accordingly any negligence on his part could not be brought home to the plaintiff or to the consortium. To this, for the defendant, it was contended that the contention and the counter-contention provided a triable issue. It was also in effect contended by the plaintiff that in any event the allegation of negligence was made frivolously without any basis and did not provide a *bona fide* triable issue.

It should not be overlooked that summary judgment under O. 14 should not be granted when any serious conflict of the facts or any real difficulty as to a matter of law arises. But however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give the final judgment - see *Cow v. Casey* [1949] 1 KB at p. 481.

Now, as has been seen, what the debenture purports to create was as a continuing Security by way of a "first fixed charge" the whole of the said land and by way of a "first floating charge" all the undertakings and "other moveable properties and assets" of the Borrower.

The right to the land was not by way of a title deed but was set out in an agreement and the Borrower was to assign its rights under the agreement to the plaintiff and was also to provide a charge in escrow of the land.

Article 5 of the debenture deals with the appointment and powers of the receiver and manager. Section 5.01(c) of Article 5 empowers the plaintiff to appoint in writing a receiver and manager and also empowers the plaintiff to remove the receiver and manager and appoint another in his stead. The section does not state whose Agent the receiver and manager is to be.

Section 5.02 sets out the express powers of the receiver and manager. He is empowered *inter alia* in the name of the Borrower or on its behalf to get in the properties charged, carry on or manage the business of the Borrower, sell or concur in the selling of the properties of the Borrower, appoint managers' agents, officers and servants and workmen to achieve the purposes of the receivership.

The debenture then deals in s. 5.03 with the sale of the lands under the provisions of the National Land Code. Section 5.06 deals with the granting of a power of attorney. The Borrower appoints the plaintiff and certain of its officers to be "its attorney or attorneys for it and in its name and on its behalf to do and execute any deed, assurance or act which may be required or may be deemed proper on any sale or disposition by the plaintiff or by any receiver and manager..."

The document is certainly not a masterpiece of draftsmanship. But there is no need for a trial to conclude, that it can be gathered from the document itself that while it provided for the contingency of the plaintiff proceeding with a foreclosure action in respect of the National Land Code Charge without first having a receiver and manager appointed it also provided for the situation of the receiver and manager being appointed. It seems to me beyond any argument that the effect of s. 5.02 is that the receiver and manager in exercising his powers will act as Agent of the Borrower doing everything he does "in the name of" or "on behalf of" the Borrower. The clincher is para. (f) of s. 5.02 which reads as follows:

> (f) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which he may or can do as Agent of the Borrower.

Section 5.03 does not help because it deals with the plaintiff applying the proceeds of the sale of the lands on a foreclosure action and has no other application.

The power of attorney provision also clearly has the effect of appointing the plaintiff and its officers as agents of the Borrower. The words used are "to be its attorney or attorneys for it and in its name and on its behalf ..." "it" and "its" being references to the Borrower.

Although the agency point as taken is perhaps not a simple point all that can be said about it can and has been said at this stage. In my judgment, it is virtually inarguable that in fact the receiver and manager had to and acted as Agent of the Borrower.

The negligence point also has no merit.

The *New Straits Times* in which the receiver and manager advertised has certainly a wider local readership than any specialist magazine, journal or periodical including most (if not all) the readers of any such local specialist publication. Whether a greater response would have been achieved by advertising in foreign journals is, I think, mere speculation. In any event, apart from Southern Iron and Steel Holdings Sdn. Bhd. and the Japanese Corporation Mitsui

& Co. Ltd., two Malaysian Public Companies and two Malaysian Private Companies responded to the advertisement. I am not satisfied that the lack of advertisement point provides a *bona fide* triable issue.

The defendants question the valuation that the receiver and manager had obtained which he obtained no doubt to enable him to know whether any offers made were worth considering. The basis for suggesting that the valuation of the "special equipment and plant', were not good enough are the Exhibit TH5 referred to in para. 24 of Tadao Hayashi's affidavit Encl. (9) and an alleged valuation by T.O. Aziz Sdn. Bhd. referred to in para. 24 of Encl. (9) supported by the Exhibit TH6 which is referred to by the deponent as a copy of the valuation. However, Exhibit TH5 has in fact no reference to any valuation of the plant and equipment and TH6 is a one-page document entitled "certificate of valuation" which simply states "value attributable to Plant and Machinery RM23,950,000" without giving any basis for such certification. Against that is Colliers Jordan Lee & Jaafar Sdn. Bhd.'s fairly comprehensive valuation setting out *inter alia* the basis of their valuation. In the final analysis it could be said that the real market value is what is offered by a willing buyer and is acceptable by a willing seller. What was offered was consistent with the Colliers Jordan Lee Jaafar's valuation and inconsistent with the director's assessment of the value.

It is relevant to note that neither the Borrower company nor any of its directors or any of the Guanrators have come up with anybody to offer anything more than was offered by the company that eventually bought the plant and machinery. On the one hand there is a valuation by professional values and a response to the advertisement by a number of companies specialising in the relevant industry or related industries and an offer somewhat more than the valuation but not inconsistent with it and on the other hand there is a mere contention without any acceptable basis for it that the amount realised for the plant and equipment was significantly less than what could have been realised. That is not good enough to satisfy the Court that there is a *bona fide* triable issue in negligence.

As to the RM1.5 million borrowed from the Oriental Bank and that that amount had been repaid to the bank in priority to the other debts, s. 5.02(b) of the debenture provides that the receiver and manager was entitled to carry on the business of the Borrower company for which purpose it could *inter alia* raise or borrow money that may be required. Kerr on *Receivers and Administrators*, 17th Edn., at p. 225 cites *Lathom v. Greenwich Ferry Co.* [1895] WN 66 to state:

> Where a receiver and manager ... has been authorised to raise money this gives him by implication power to create a charge to secure the money in priority to existing debentures.

Clearly it was invoking that s. 5.02(b) power that the receiver and manager borrowed the money and unless it can be shown that the raising of that amount was improperly done that point is a non-point. The defendants have not shown anything that suggests that the raising of that loan was not necessary or improperly done. On the other hand the plaintiffs have shown that the RM1.5 million raised from the Oriental Bank was relevant to the running of the business and that in fact it had been "ploughed back", as it were, into the company.

The only other point that needs to be dealt with is the complaint that monies realised from the sale of assets were not forthwith credited to the account of the Borrower. The agreement for the sale of the assets provided that the money paid had to be held by the solicitors until certain matters had been attended to or happened. In the meantime the amounts were held in interest-earning fixed deposits and when under the terms of the agreement the money could be released it was released together with the earned interest. It certainly does not provide any, not to speak of a *bona fide*, triable issue.

The plaintiffs were entitled to summary judgment. The appeal is allowed with costs here and of the Court below. There will be summary judgment for the plaintiffs as prayed in their amended O. 14 summons Encl. (47).

Also found at [1992] 4 CLJ 2241